No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in RLC.

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC"), *amicus*, represents national and regional retailers, including many of the country's largest and most innovative retailers. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

The Chamber of Commerce of the United States of America ("Chamber"), *amicus*, is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus* briefs in cases raising issues of vital importance to the business community.

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[1] On May 14, 2018, RLC notified the parties of its intention to file this brief and both parties have consented to the filing of this brief. On May 25, 2018, *Amici* notified the parties that the Chamber would be joining this *amicus* brief. *Amici* affirm that no counsel for a party wrote this brief in whole or in part, and no counsel or party, or any other person other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the brief's preparation or submission.

This is such a case. *Amici*'s members frequently find themselves targets of large interstate class action lawsuits. They have a keen interest in ensuring that the rules governing removal of class actions to federal court are applied fairly.

In enacting the Class Action Fairness Act of 2005 ("CAFA"), Congress expanded federal court jurisdiction and, critically here, made removal more broadly available. In the years since CAFA's enactment, *amici*'s members have come to rely on CAFA in general and the removal provisions in particular to avoid many of the abuses that they had seen in state court class action practices.

The ruling of the court below threatens the robust protections of CAFA. It ignores Congress' extensively-deliberated and practical legislative solution to the problem of state court class action abuses and instead applies an overly-restrictive reading of this Court's decision in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941).

The Fourth Circuit's needlessly constrained analysis of removal law will harm businesses across the country. With little extra effort, class counsel can now file their class claims as counterclaims in their state courts of choice, with no fear of triggering CAFA's protections. Inevitably, an increasing number of *amici*'s members will be drawn into these cases trapped in the same state court systems that Congress has recognized to be unsuitable venues for the

resolution of such cases. *Amici* and their members therefore have a strong interest in this case.

SUMMARY OF ARGUMENT

When it passed in 2005, the Class Action Fairness Act promised nothing less than a wholesale reform of the class action litigation system in the United States. Congress crafted a variety of substantive changes to eliminate the most abusive practices plaguing class actions across the country. Critically, Congress armed CAFA with procedural protections to ensure that its reforms would apply to virtually all large interstate class actions. At the heart of these procedural protections lay the reforms to the standards for removal. No longer would plaintiffs' lawyers be allowed to stack the deck in their favor by manipulating large cases into friendly state-court venues.

CAFA has lived up to its advance billing. Thanks to this innovative federal statute, many of the most egregious class action practices have been extinguished. Yet this progress is at risk, thanks to an incorrect and overly-restrictive interpretation of *Shamrock Oil*. The members of the Court who decided *Shamrock Oil* could never have foreseen either the coming rise in class actions or Congress' eight-year effort that would eventually culminate in CAFA. Nor could they have foreseen how their ruling prohibiting one type of forum shopping would be the foundation

for a renaissance in class action-related forum shopping.

This case merits review by this Court. *Amici* fully supports the legal arguments raised in the Petition. The reforms that changed the U.S. class action system were too hard-won and too important to be dismantled by the misapplication of *Shamrock Oil*. The Petition should be granted.

ARGUMENT

This Court's intervention is critical for two reasons. First, the decision below risks fundamentally undercutting the legislative scheme Congress carefully crafted in CAFA. Second, the question presented is a recurring one of exceptional importance.

I. The Decision Below Undermines Congress' Extensive Effort to Curtail Class Action Abuse in State Courts.

In 2005, our nation took an important step toward ending class action abuse with the enactment of CAFA. The preceding decade had seen an exponential increase in the number of class actions filed. By including a single plaintiff from their chosen jurisdiction, plaintiffs' lawyers were able to bring interstate class actions involving tens or even hundreds of millions of dollars in a select number of state courts that came to be known as "'magnet' jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005). These magnet

jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements that primarily benefited plaintiffs' lawyers. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions.

Since the enactment of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.), the class action system in the United States has largely moved from state courts into the federal system. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1754 (2008) (pointing to "support for the conclusion that the federal courts have seen an increase in diversity removals"); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1610 (2008) ("CAFA has increased . . . the number of class action removals to federal court."). As a result of the countless hours of fact-finding, deliberation, and negotiation, Congress created a system that has succeeded in curtailing many of the worst class action abuses.

The case below, through the tactic it endorses, presents a serious threat to CAFA's protections. It endorses an end-run around CAFA's core procedural safeguards, forcing defendants to litigate massive class actions in the very same "magnet jurisdictions" that prompted Congress to enact CAFA in the first place.

Only this Court can close this loophole and protect Congress' deliberate design for safeguarding the class action system.

A. Congress Developed the Class Action Fairness Act to Address Perceived Class Action Abuses in State Courts.

In the late 1990s, in response to growing complaints about class action abuses from coast to coast, Congress began a "grinding eight-year effort" that ultimately resulted in the CAFA. Edward Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1823 (2008); *see also* S. Rep. 109-14 (2005); Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. Miami L. Rev. 385 (2005).

Passage of CAFA was no foregone conclusion. Congress had previously considered, and failed to pass, no fewer than four bills aimed at addressing concerns about class action abuses: the Interstate Class Action Jurisdiction Act of 1999, 106 Bill Tracking H.R. 1875, (passed the House but not considered by the Senate); the Class Action Fairness Act of 2002, 148 Cong. Rec. H. 847 (passed the House but not voted on by the Senate); the Class Action Fairness Act of 2003, 108 Bill Tracking H.R. 1115 (passed the House, but due to a filibuster, was not voted on by the Senate); and the Class Action Fairness Act of 2004, 108 Bill Tracking S. 2062, (stalled in the Senate, not voted on in the House). Andreeva, 59 U. Miami L. Rev. at 387-88.

Ultimately, beyond numerous committee hearings in both the House and the Senate, CAFA's passage required "multiple reports by both Houses, political compromises, two unsuccessful attempts to terminate debate in the Senate by imposing cloture on bills with bipartisan support, and strenuous efforts to amend in both the House and Senate when the bill came to the floor for a final vote." Purcell, 156 U. Pa. L. Rev. at 1823.

In enacting CAFA, Congress took note of widespread abuse of the class action device in the state courts. For example, through the "findings and purposes" section of CAFA, Congress recognized that these abuses had "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." CAFA § 2(a)(2) (codified at 28 U.S.C. § 1711 notes). Congress particularly focused on settlements that primarily enriched class counsel, but wherein "class members often receive little or no benefit from class actions and are sometimes harmed" as well as settlements that created unfair distribution among class members, and notice schemes "that prevented class members from being able to fully understand and effectively exercise their rights." CAFA § 2(a)(3) (codified at 28 U.S.C. § 1711 notes); *see also* Purcell, 156 U. Pa. L. Rev. at 1851-56; Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U.L. Rev. 729, 743-44 (2013). These are the very

abuses that corroded interstate commerce and that CAFA sought to address.

Congress also took into consideration problems highlighted by the American Bar Association Task Force on Class Action Legislation. Specifically, the Task Force highlighted the problems that arose from state courts creating rulings with a nationwide impact, despite those courts possibly having a small interest in the subject of the litigation. *See Report of the ABA Task Force on Class Action Legislation*, https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_304.authcheckdam.pdf; *see also* James M. Underwood, *Rationality, Multiplicity, & Legitimacy: Federalization of the Interstate Class Action*, 46 S. Tex. L. Rev. 391, 407 (2004).

The problems inherent in a balkanized, state-court driven class action system only increased when looking beyond the four corners of any individual case. More broadly, interstate commerce suffered from the problems of overlapping class actions with the attendant risk of inconsistent results and decisions of national importance being made by local state judges. The Advisory Committee Report to the Federal Judicial Conference Committee of 2002, http://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf, emphasized this risk and reached a "unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems." Underwood, 46 S. Tex. L. Rev.

at 410, quoting Report of the Civil Rules Advisory Committee 311 (May 20, 2002), http://www.uscourts.gov/sites/default/files/fr_import/CV5-2002.pdf, (presented to the Standing Comm. on Rules of Practice and Procedure); *see also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. Rev 461, 540 (2000) (arguing for expanded removal and multidistrict transfer statutes to minimize risk of overlapping actions).

In the nine sections of CAFA, Congress created a host of protections and safeguards designed to minimize these abuses and protect the system of interstate commerce in the courts. For example, CAFA prohibits unequal treatment of class members based on their geographic location CAFA § 3(a) (codified at 28 U.S.C. § 1714); requires notification of the state Attorneys General prior to any class settlement CAFA § 3(a) (codified at 28 U.S.C. §§ 1715(b), (d)); requires improved notice to class members CAFA § 3(a) (codified at 28 U.S.C. § 1715(e)); and restricts the availability of coupon/no-cash settlements CAFA § 3(a) (codified at 28 U.S.C. § 1712). These reforms, on their own, provided powerful tools against some of the more egregious abuses. *See* Klonoff, 90 Wash. U.L. Rev. at 745.

Yet Congress had no ability to directly influence the procedures and safeguards in state court systems, the home of much of the most egregious misconduct that Congress sought to address. Congress found that state and local courts (A) kept "cases of national importance out of Federal court; (B) sometimes act[ed]

in ways that demonstrate[d] bias against out-of-State defendants; and (C) [made] judgments that impose[d] their view of the law on other States and [bound] the rights of the residents of those States." CAFA § 2(a)(4) (codified at 28 U.S.C. § 1711 notes). Congress thus stepped in to help dismantle "a system that allows state court judges to dictate national policy . . . from the local courthouse steps contrary to the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14, at 24 (2005).

With principles of federalism barring direct regulation of state court procedures, Congress chose to open the federal courthouse doors a little wider, allowing original and removal subject matter jurisdiction in class actions that would previously have been locked in state court. Specifically, CAFA amended 28 U.S.C. § 1332 to create original and removal jurisdiction in federal courts of any class with 100 or more members if "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." CAFA, § 4, (codified at 28 U.S.C. § 1332(d)). This $5,000,000 minimum may be satisfied by aggregating the value of class members' claims, regardless of whether any individual claim would independently satisfy the $75,000 amount in controversy in the diversity statute. *See generally* 28 U.S.C. § 1332. Finally, the statute relaxed the complete diversity requirement in favor of a "minimal diversity" standard that requires only that one plaintiff and one defendant be citizens of different

states. CAFA, § 4 (codified at 28 U.S.C. § 1332(d)); *see generally* Andreeva, 59 Miami L. Rev. at 388-92.

These changes alone were insufficient, however, if class actions remained in state courts due to the restrictive removal procedures of 28 U.S.C. § 1441. Prior to CAFA, the applicable "law enable[d] plaintiffs' lawyers who prefer[red] to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10 (2005).

To address this, Congress enacted, through CAFA, a more permissive removal system. *See* Lee & Willging, 156 U. Pa. L. Rev. at 1738. First, it allowed the removal of class action suits by "any defendant." CAFA, § 5 (codified at 28 U.S.C. § 1453(b)). Second, it permitted removal even if one of the defendants is a citizen of the state in which the action was brought. *Id.* Third, it eliminated the one-year deadline for removal for cases removed under CAFA. *Id.* And finally, it expanded the ability of defendants to obtain an expedited appeal of a remand order. *Id.* (codified at 28 U.S.C. § 1453(c)); *see also* Lee & Willging, 156 U. Pa. L. Rev. at 1738. To ensure that the intent of CAFA was met, House Judiciary Committee Chairman James Sensenbrenner noted that if "a Federal court is uncertain . . . [that] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (Statement of Rep. Sensenbrenner).

This Court recognized this Congressional intent in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014), stating that CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." Just as importantly, the Court noted that "CAFA's primary objective" was "ensur[ing] Federal court consideration of interstate cases of national importance." *Id.* The Court unequivocally announced that "no antiremoval presumption attends cases invoking CAFA." *Id.*

Put together, these changes in the applicable jurisdiction and removal statutes gave CAFA its power. "The main point of CAFA was to permit defendants to remove large-scale class action litigation from plaintiff-favored state courts to federal courts. The data suggest that it is doing exactly that, as federal courts have experienced a significant upswing in class actions since CAFA's enactment." Erichson, 156 U. Pa. L. Rev. at 1607. To the extent a class action litigant prefers federal over state court, "CAFA's impact is direct and obvious." *Id.* For example, class action filings in the Madison County, Illinois Circuit Court fell from 106 in 2003 to only 3 in 2006. *Id.* at 1609-10.

Through CAFA's one-two punch of changes to jurisdictional and removal statutes, the risk of abusive state court forum-shopping declined.

B. The Procedure Endorsed by the Ruling Below Threatens the Core Elements of Congress' CAFA Reforms.

Through the procedural technicalities countenanced by the Fourth Circuit below, as well as the Sixth, Seventh, and Ninth Circuits, class action counsel have found a relatively simple solution around CAFA's protections. *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.) (prohibiting removal of class action counterclaim by third party counterclaim defendant), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012) (same); *Westwood Apex v. Contreras*, 644 F.3d 799, 804-05 (9th Cir. 2011) (same); *Palisades Collection LLC v. Shorts*, 552 F.3d 327, 334-35 & n.4 (4th Cir. 2008) (same).

The case below illustrates the archetypal mechanism that class counsel are now using to avoid the safeguards Congress constructed through CAFA. A consumer purchased an item, here a water-treatment system, on credit and then failed to make payments. Pet. App. 2a–3a. When the consumer was sued in a simple collection action, the consumer asserted a class action counterclaim against the original plaintiff and, importantly, two third parties. Pet. App. 2a. Relying on the "original defendant" rule in *Shamrock Oil*, 313 U.S. at 108-09, the class action plaintiff managed to defeat the removal attempt. Pet. App. At 9a–11a.

There is no dispute that CAFA would apply if the consumer had filed that class action counterclaim as a standalone complaint. The case would be removable, and all of CAFA's protections, designed by Congress over eight long years of bruising battles, would be triggered. But thanks to the procedural hook created in the collection action, the class plaintiff here has found a CAFA antidote—a seventy-seven year old case that spoke neither of class actions nor of third party defendants, *Shamrock Oil*, 313 U.S. at 106-09.

As the Petition explains (Pet. 12-16), *Shamrock Oil* was based on the foundational principle that a plaintiff who picked one forum, the state court, should not be permitted to remove its own matter simply by virtue of being later named as a counterclaim defendant. *Shamrock Oil*, 313 U.S. at 107-08. At its heart, *Shamrock Oil* stands as a limit on plaintiff forum-shopping. The plaintiff must "abide his selection of a forum," regardless of whether he is later sued by the original defendant. *Id.* at 106 n.2, 107.

It is no small irony, then, that the anti-forum shopping *Shamrock Oil* is, today, the chief weapon for defeating CAFA, the strongest anti-forum shopping statute ever issued by Congress in the class context.

Like the Sixth, Seventh, and Ninth Circuits, the Fourth Circuit in the decision below read *Shamrock Oil* to exclude counterclaim defendants who were not original plaintiffs from the scope of the general removal statute. *See* Pet. App. 9a ("We hold that the Supreme Court has not called into question *Palisades*'s

conclusion that an additional counter-defendant is not entitled to remove under § 1441(a) or § 1453(b), nor has it abandoned *Shamrock Oil*'s definition of 'defendant' in the class action context."); *Tri-State Water Treatment*, 845 F.3d at 354 ("All we know from *Shamrock Oil* is that removal is not available for a plaintiff who is a counterclaim-defendant. Both the Supreme Court and Congress have left *Shamrock Oil* undisturbed during the ensuing 75 years."); *In re Mortg. Elec. Registration Sys.*, 680 F.3d at 853 (citing *Shamrock Oil* for the proposition that "a counterclaim or third-party defendant is not a 'defendant' who may remove the action to federal court"); *Westwood Apex*, 644 F.3d at 804 ("Since the Supreme Court's decision in *Shamrock Oil* ... 'defendant' for purposes of designating which parties may remove a case under § 1441 has been limited by a majority of the courts to mean only 'original' or 'true' defendants; 'defendant' in Chapter 89, thereby, excludes plaintiffs and non-plaintiff parties who become defendants through a counterclaim."); *Palisades*, 552 F.3d at 332 ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants.").

This method of analysis ignores both *Shamrock Oil*'s procedural context and CAFA's comprehensive legislative scheme. It is clear that these circuits believe themselves constrained by the wording of *Shamrock Oil*'s holding. If so, only this Court is in a position to course-correct. *Shamrock Oil* requires a claimant to abide his choice of a forum; it does not

permit counterclaim defendants to trap unwilling third party defendants in state court.

II. The Question Presented is a Recurring One of Exceptional Importance.

The procedural posture of the case below is no procedural fluke. It is part of a growing trend of cases that are incorporating the class action counterclaim. *See, e.g., Bank of N.Y. Mellon v. Cioffi*, No. 15-13935, 2016 U.S. Dist. LEXIS 95474 (D. Mass. July 21, 2016); *Ford Motor Credit Co. v. Jones*, No. 1:07-cv-728, 2007 U.S. Dist. LEXIS 55336 (N.D. Ohio July 31, 2007); *Citifinancial, Inc. v. Lightner*, No. 5:06-cv-145, 2007 U.S. Dist. LEXIS 41338 (N.D. W. Va. June 6, 2007); *Unifund CCR Partners v. Wallis*, Nos. 06-CV-545, 06-CV-546, 06-CV-547, 2006 U.S. Dist. LEXIS 17989 (D. S.C. Apr. 7, 2006); *Williamsburg Plantation, Inc. v. Bluegreen Corp*, 478 F. Supp. 2d 861 (E.D. Va. 2006); *Unifund CCR Partners v. Harrell*, 509 S.W.3d 25 (Ky. 2017); *Taylor v. First Resolution Investment Corp.*, 72 N.E.3d 573 (Ohio 2016); *Cach, LLC v. Echols*, 506 S.W.3d 217 (Ark. 2016); *Citibank, N.A. v. Perry*, 797 S.E.2d 803 (W. Va. 2016); *Midland Funding LLC v. Hiliker*, 68 N.E.3d 542 (Ill. App. 2016); *Portfolio Recovery Associates, LLC v. Dixon*, 366 P.3d 245 (Kan. App. 2016).

If allowed to stand, the decision below will result in enterprising plaintiffs' counsel inviting small claims lawsuits, then converting the defendant into a counterclaim plaintiff, forcing defendants to litigate matters of nationwide importance in the very "magnet"

jurisdictions that were the source of the problems that led to the passage of CAFA.

Any plaintiff's counsel who is unclear what to do can find a road map from the consultant who advised the collection-action defendant in *Palisades*, 552 F.3d at 329-30. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 240 (2007) (laying out framework for adjudication of counterclaim class actions in state court and stating that the "Article has shown that the eulogy for state-court class-action practice is a bit premature"). The counterclaim class action is nothing short of a full assault on the protections of CAFA.

This is a significant problem for businesses and consumers alike. CAFA has been making slow—but steady—progress and has, in turn, reduced the burdens that class action abuse imposes on the national economy. If the Fourth Circuit's decision is allowed to stand, however, plaintiffs' lawyers will be able to evade CAFA and trap these cases in the many "magnet jurisdictions" for abusive class actions. *Amici* respectfully requests that this Court step in and foreclose this judicial erosion of the class action standards Congress enacted in CAFA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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